Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
TSA Stores, Inc. (The Sports Authority)	)	**CG Docket No. 02-278**
	)	
Petition for Declaratory Ruling with	)	
Respect to Certain Provisions of the	)	
Florida laws and regulations	)	

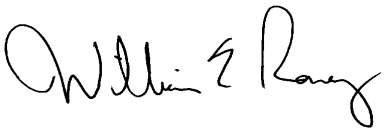
REPLY COMMENTS WITH REGARD TO COMMENT FILED BY STATE OF FLORIDA

TSA Stores, Inc. ("TSA"), hereby replies to Florida's "Motion to Dismiss for Lack of Jurisdiction and Other Grounds" filed with the Commission on June 3, 2005.

In that document, Florida argues that the issue of preemption is *res judicata* based on a federal decision ordering the case to be remanded back to state court after TSA removed Florida's action to federal court. (Case No. 6:04-CV-115-ORL-JGG). In that order, the court ruled that "complete preemption" did not apply to the TCPA but noted that "complete preemption is related to but differs from the related doctrine of 'ordinary preemption.'" Order, pg. 3 (Attached hereto as ***Exhibit A***). While ordinary preemption provides no basis for federal jurisdiction or removal, complete preemption does. The court ruled that there was no complete preemption, but that "ordinary preemption may be invoked in either state or federal court as a defense, asserting that the plaintiff's claims have been substantively displaced by federal law." Order, pg 4. Thus, TSA continues to assert its claims of preemption in state court in Florida, the federal court did not rule that the TCPA was not preempted limiting its Order to the jurisdictional issue related to "complete preemption," and this matter is not *res judicata* based on the Florida decision.

Respectfully submitted,

COPILEVITZ & CANTER, LLC



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CERTIFICATE OF SERVICE

I, William E. Raney, do hereby certify that I have on this 18th day of August, 2005, had a copy of the foregoing delivered to the following, via Electronic Mail, as indicated:

Louis Stolba
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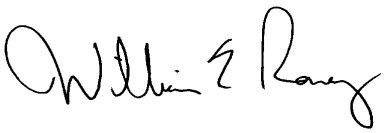
Via Email: Stolbal@doacs.state.fl.us



William E. Raney

EXHIBIT A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

STATE OF FLORIDA, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,

Plaintiff,

-vs-

Case No. 6:04-cv-115-Orl-JGG

THE SPORTS AUTHORITY FLORIDA, INC.,

Defendant.

ORDER

This cause came on for consideration without oral argument on Plaintiff's Motion to Remand (Docket No. 7) and memorandum in support (Docket No. 8), as well as Defendant's memorandum in opposition (Docket No. 10). For the reasons stated below, the Motion to Remand ("the Motion") is **GRANTED**.

I. PROCEDURAL HISTORY

Plaintiff, State of Florida Department of Agriculture and Consumer Services (the "Department") filed suit against Defendant, The Sports Authority Florida, Inc. ("The Sports Authority"), on December 4, 2003 in the Circuit Court in and for Orange County, Florida. In its complaint (Docket No. 2), the Department alleged that The Sports Authority violated Fla. Stat. § 501.059, a subsection of Florida's Consumer Protection Statute that governs telephone solicitation. Docket No. 2 at ¶¶ 7-8. Specifically, the Department alleged that The Sports Authority violated § 501.059(4) by making calls (or causing calls to be made) to consumers on the state's "No Sales Solicitation" list and violated § 501.059(7) by utilizing a recorded message that plays when a caller answers. Docket No. 2 at ¶ 7.

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On January 27, 2004, The Sports Authority filed a Notice of Removal in the state court. The Sports Authority asserted that the Department's state law claims under § 501.059 had been completely preempted by the federal Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. § 227, which – *inter alia* – prohibits unsolicited telephone calls that employ prerecorded messages. *See* 47 U.S.C. § 227(b)(1)(B). On February 6, 2004, the Department filed a motion to remand, arguing that the TCPA did not preempt state-law claims, and therefore the district court lacked subject matter jurisdiction to hear the dispute. *See* Docket No. 7.

The Sports Authority asserts that the calls referred to in the complaint were all made into Florida from out of state. Docket No. 10 at page 3. The complaint itself is silent as to whether the calls originated inside or outside of Florida. *See id.*

The Sports Authority also contends that the Department has engaged in "artful pleading" and – without further elaboration – that this, too, provides a basis for removal. See, e.g., Docket No. 10 at 15. However, The Sports Authority acknowledges that its artful pleading argument requires a determination that Congress intended to completely preempt the claims raised by the Department:

> Artful pleading requires the presence of either complete preemption o[r] a state cause of action the merits of which turn on an important federal question. *Here, the merits of this case turn on the fact that the TCPA completely preempts the purported state law claims and require [sic] Plaintiff to sue in federal court.*

Docket No. 10 at 16-17 (internal citation omitted and emphasis added).

This order does not address the artful pleading issue, because resolution of the preemption issue fully resolves the motion to remand. If Congress intended to completely preempt the Department's state-law claims, The Sports Authority's removal here was proper (without any need to consider whether the Department engaged in artful pleading); if Congress did not intend to preempt the Department's state-law claims, removal was improper (and artful pleading, per The Sports Authority's italicized statement above, could not have occurred here).

II. ANALYSIS

A. Types of Preemption

Pursuant to 28 U.S.C. § 1441(a), a defendant may remove from state court any civil action "of which the district courts of the United States have original jurisdiction" – including, of course, civil actions that raise a federal question. The jurisdictional issue of whether a complaint raises a federal question is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1090 (11th Cir. 2002) (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Generally speaking, "the plaintiff is the master of the claim ... [and] may avoid federal jurisdiction by exclusive reliance on state law." *Behlen*, 311 F.3d at 1090.

The Supreme Court has recognized an "independent corollary" to the well-pleaded complaint rule – the doctrine of complete preemption. Complete preemption can provide a basis for federal jurisdiction (and, by extension, for removal) even if the plaintiff has apparently relied exclusively on state law in drafting its complaint. *Geddes v. American Airlines, Inc.*, 321 F.3d 1349, 1352 (11th Cir. 2003). In essence, complete preemption transforms state-law claims into federal-law claims for purposes of the well-pleaded complaint rule:

> On occasion, the Court has concluded that the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987) (internal quotations and citations omitted).

The doctrine of complete preemption is related to but differs from the related doctrine of "ordinary preemption." Ordinary preemption provides no basis for federal jurisdiction or removal:

> Preemption is the power of federal law to displace state law substantively. The federal preemptive power may be complete, providing a basis for jurisdiction in the federal courts, or it may be what has been called "ordinary preemption," providing a substantive defense to a state law action on the basis of federal law.

Geddes, 321 F.3d at 1352. Ordinary preemption may be invoked in either state or federal court as a defense, asserting that the plaintiff's claims have been substantively displaced by federal law. *Id.* at 1353.

B. Finding Complete Preemption

The Supreme Court has cautioned that complete preemption can be found only in statutes with "extraordinary" preemptive force. *Caterpillar*, 482 U.S. at 393. Within this Circuit, this extraordinary preemptive force "must be manifest in the clearly expressed intent of Congress." *Geddes*, 321 F.3d at 1353. Moreover, the United States Court of Appeals for the Eleventh Circuit has advised the district courts that the complete preemption inquiry "turns on the question of whether Congress not only intended for a federal statute to provide a defense to state-law claims, but also intended to confer on defendants the ability to remove a case to a federal forum." *Id.*

In the instant case, a careful reading of the TCPA indicates that Congress neither intended it to provide a defense to state-law claims nor intended it to allow removal of such claims to a federal forum. Subsection (e) of 47 U.S.C. § 227, titled "Effect on State law," provides in pertinent part that

> (1) State law not preempted
>
> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits –
>
> (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
>
> (B) the use of automatic dialing systems;
>
> (C) the use of prerecorded voice messages; or

(D) the making of telephone solicitations.

The two exceptions referred to in the first paragraph of 47 U.S.C. § 227(1) do not apply in the instant case. Subsection (d) of Section 227 prescribes minimum technical and procedural standards for facsimile machines and prerecorded voice systems. The Sports Authority does not contend that the state law at issue here – Fla. Stat. § 501.059 – conflicts with those standards. Paragraph (2) of 47 U.S.C. § 227(e) forbids states that establish their own "Do Not Call" databases from failing to incorporate the state residents from the national "Do Not Call" database into the state database. The Sports Authority has not argued that Florida has run afoul of this prohibition.

The state law that The Sports Authority allegedly violated – Fla. Stat. § 501.059 – prohibits, in pertinent part, "mak[ing] or knowingly allow[ing] a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called" – i.e., activities listed in 47 U.S.C. § 227(e)(1)(B) and (C). *See* Fla. Stat. § 501.059(7)(a). The Florida statute at issue also prohibits telemarketers from making unsolicited telephone calls to people who have signed up on a "Do Not Call" list – i.e., from "making . . . telephone solicitations," as described in 47 U.S.C. § 227(e)(1)(D). *See* Fla. Stat. § 501.059(4). In other words, while The Sports Authority points to the TCPA as preempting the state-law unsolicited-sales-call and improper-use-of-prerecorded-messages claims against it, the TCPA itself *expressly disavows* any intent to preempt such claims. *See* 47 U.S.C. § 227(e)(1)(B), (C) and (D).

Similarly, 47 U.S.C. § 227(f) disclaims any intent to bar state-law actions, such as this one, brought by the state on behalf of its residents: "Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such state." 47 U.S.C. § 227(f)(6).

The Sports Authority wholly ignores the statutory language quoted above as well as its implications regarding Congressional intent. Rather, The Sports Authority makes two main arguments in support of its contention that Congress has completely preempted state law regulation of interstate telephone calls. First, The Sports Authority points to various statements, made by the Federal Communications Commission ("FCC"), that the TCPA would likely preempt state laws that differ from those enacted under the TCPA. For example, The Sports Authority asserts that in a 2003 Report and Order amending the TCPA regulations [henceforth, "FCC-03-153"], the FCC "affirmed once again that state laws which differ from the TCPA would 'almost certainly' be preempted based on an interest in uniform treatment of interstate calls and Congressional intent." Docket No. 10 at 3. In support of this assertion, The Sports Authority quotes from FCC-03-153:

> Congress enacted section 227 . . . to give the Commission jurisdiction over both interstate and intrastate telemarketing calls. Congress did so based upon the concern that states lack jurisdiction over interstate calls. Although section 227(e) gives states authority to impose more restrictive intrastate regulations, we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. . . .
>
> We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted.

Id. at §§83-84 (paragraph numbers and footnotes omitted).

The Sports Authority, however, neglects to include the following paragraph from the Report and Order, which seriously undercuts its position with regard to state regulation:

> [The National Association of Attorneys General, or NAAG] contends that states have historically enforced telemarketing laws, including do-not-call rules, within, as well as across, state lines pursuant to "long-arm" statutes. . . . We note that such "long-arm" statutes may be protected under section 227(f)(6). . . . *Nothing that we do in this order prohibits states from enforcing state regulations that are consistent with the TCPA and the rules established under this order in state court.*

Id. at § 85 (emphasis added). Although The Sports Authority contends that the Florida statute is inconsistent with the TCPA, it fails to demonstrate – or even point to – any actual inconsistencies. As such, the instant suit would fit under the FCC's "exception" articulated in the last sentence of the above-quoted passage.

Even if the Court were to agree with the FCC's assessment of Congressional intent – i.e., that the TCPA was intended to protect telemarketers from being forced to comply with inconsistent state laws – it would not follow that Congress therefore intended to completely preempt such laws. As the *Geddes* court explained, the complete preemption inquiry "turns on the question of whether Congress not only intended for a federal statute to provide a defense to state-law claims, *but also intended to confer on defendants the ability to remove a case to a federal forum.*" *Geddes* at 1353 (emphasis added). An intent to protect telemarketers against inconsistent state laws, standing alone, does not indicate that Congress intended to allow telemarketers to remove these disputes to district court. State courts are fully capable of adjudicating the merits of a federal defense, including the defense of ordinary preemption.

The second primary argument advanced by The Sports Authority involves the state courts' alleged lack of jurisdiction over the regulation of interstate telephone calls. *See* Docket No. 10 at 2. The Sports Authority contends that state courts lack jurisdiction over state law claims that amount to such regulation due to complete preemption by Congress. *See* Docket No. 10 at 2. Assuming, *arguendo*, that the calls at issue in this case were, in fact, interstate calls (a point not addressed in the complaint), The Sports Authority's argument still fails to demonstrate that this Court has jurisdiction over such claims.

The FCC order itself contradicts The Sports Authority's assertion about the justification for passing the TCPA: "Congress enacted [the TCPA] . . . to give the Commission jurisdiction over both

interstate and intrastate telemarketing calls. *Congress did so based upon the concern that states lack jurisdiction over interstate calls.*" FCC-03-153 at 3 (emphasis added). In other words, assuming the FCC is correct, the TCPA could not have preempted state jurisdiction of interstate calls, because states never had such jurisdiction. Also, as noted above, the FCC recognizes that the states implement some "oversight" of interstate phone activity by way of long-arm statutes.

In addition, the TCPA itself at several points contradicts the claim that it was intended to eliminate state court jurisdiction over interstate calls. For example, 47 U.S.C. § 227(b)(3), part of the TCPA subsection dealing with misuse of automated telephone equipment, provides in relevant part that "[a] person or entity may, *if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that state* . . . an action based on a violation of this subsection or the regulations prescribed under this subsection . . ." (emphasis added). Similarly, the TCPA subsection dealing with violations of the "Do Not Call" registry provides that "[a] person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection *may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State* . . . an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater". 47 U.S.C. §227(c)(5).

It is impossible to reconcile The Sports Authority's claim that states lack *any* authority in this area with the above-quoted statutory recognition of (and deference to) such authority. That claim also cannot be reconciled with the TCPA's requirement that private actions for violations of its provisions can only be brought in state court. *See Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998) (joining Fourth and Fifth Circuits in holding that federal courts lack subject matter

jurisdiction of private actions under the TCPA").[1] *See also Van Bergen v. Minnesota*, 59 F.3d 1541, 1548 (8th Cir. 1995) (rejecting argument that TCPA completely preempted Minnesota telemarketing statute due to lack of express or implied preemption, and absence of actual conflict between the state and federal laws).

III. CONCLUSION

For the foregoing reasons, the Court find that the TCPA does not completely preempt Fla. Stat. § 501.059, and therefore this case was improvidently removed from state court. Accordingly, it is

ORDERED that on Plaintiff's Motion to Remand (Docket No. 7) is **GRANTED**, and this case is hereby **REMANDED** back to the Circuit Court in and for Orange County, Florida.

DONE and **ORDERED** in Orlando, Florida this 4th day of June, 2004.

JAMES G. GLAZEBROOK
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Counsel of Record
Unrepresented Parties

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[1] Although 47 U.S.C. § 227(b)(3), 47 U.S.C. § 227(c)(5), and the *Nicholson* case involve private claims – rather than, as here, claims brought by a state agency – their underlying rationale provides guidance as to the intent of Congress in enacting the TCPA. If Congress has not seen fit to completely preempt a certain category of private claims, it suggests that Congress has not preempted those same claims when brought by a state on behalf of its residents. Generally speaking, the question of complete preemption turns on the area of law at issue rather than the identity of the litigants. *See, e.g., Metropolitan Life Ins. v. Taylor*, 481 U.S. 58, 63-64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) ("Congress may so completely pre-empt *a particular area* that any civil complaint raising this select group of claims is necessarily federal in character"). In the instant case, telemarketers would be subjected to the same "inconsistent regulation" whether this state-law suit had been brought by a Florida resident or by the state of Florida on behalf of that resident.